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No. 92-____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERALD J. GARNER,

Petitioner,

—v.—

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

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QUESTIONS PRESENTED

In a state disbarment proceeding against petitioner, a federal employee appeared voluntarily as the sole witness in support of the proposed disbarment, and the principal documents introduced against petitioner were from the federal agency's files. Petitioner subpoenaed other agency documents; there was no motion to quash, but the agency did not comply with the subpoena. The judicial officer presiding did not order compliance with the subpoena, and allowed the witness to refuse to answer cross-examination questions, attempting neither to persuade nor to coerce the witness to answer but leaving the direct testimony to stand as the basis for disbarment. The questions presented are:

1. Whether the claim of privilege by the subordinate employee was properly sustained under the principles of this Court's relevant decisions.

2. Whether the resulting restriction of cross-examination, while leaving the direct testimony standing, denied petitioner the due process of law required by the Fourteenth Amendment.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

Petitioner, Gerald J. Garner, petitions for a writ of certiorari to review the order of the Supreme Court of the State of New York, Appellate Division, Second Department, confirming the Report of the Referee and ordering petitioner disbarred. The Court of Appeals of the State of New York dismissed petitioner's appeal as of right without reaching the merits of the case, upon the ground that the appeal presented no substantial constitutional question directly involved, and denied petitioner's alternative motion for leave to appeal.

OPINIONS BELOW

The Report of the Referee, which is unreported, is reprinted in the Appendix at 1a-11a. The *per curiam* Opinion & Order of the Appellate Division, Second Department, (12a-

15a), is reported at 176 A.D.2d 26, 580 N.Y.S.2d 59 (1992). The Orders of the Court of Appeals of the State of New York (16a-17a) are reported at 80 N.Y.2d 917 (1992).

JURISDICTION

The Order of the Appellate Division, Second Department, was entered on February 10, 1992. The Orders of the New York Court of Appeals were entered on September 17, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This petition arises from a state grievance proceeding that resulted in an order of disbarment. The sole witness against petitioner was a federal agency employee, appearing by voluntary arrangement, who answered all questions put to him by the prosecuting agency but refused to answer a number of cross-examination questions on grounds that his authority to appear and testify did not permit him to respond. The grievance proceeding had sprung from communications between the federal agency and the Grievance Committee for the Ninth Judicial District of the State of New York (the "Grievance Committee"); as recounted by the respondent Grievance Committee, its complaint against petitioner was "[b]ased upon information supplied to . . . the Committee" by

an employee of the federal agency.[1] Nevertheless, the Referee sitting as the judicial officer to hear the evidence neither (i) urged the single prosecuting witness from the federal agency to answer, (ii) attempted to coerce answers, nor (iii) struck the direct testimony because of the refusal to submit to cross. Further, the Referee deemed himself powerless to enforce a subpoena for documents served by petitioner upon the agency, regarding which there had been no motion to quash. These circumstances generate the questions tendered for review.

Background - The First Grievance Proceeding

Petitioner was admitted to the New York bar on March 29, 1961. After practicing law for some 22 years with an "unblemished record," as a Referee later found, compiling an "impressive record of communal activities" in charitable, professional *pro bono*, and other public service work, he became the subject of a disciplinary proceeding. In February 1975, for the sole purpose of assisting adoptive parents to remain anonymous from the natural mother, with the full knowledge of the California hospital from which the adoption was being made, and for no personal gain to himself, petitioner submitted a document containing fictitious names for the adopting parents. (Apparently, petitioner told the nurse taking the paper in question that he would give her only fictitious names; she accepted this as satisfying the "technicality" with which she was complying.) Though no one was injured, on October 1, 1984, petitioner was ordered suspended from the practice of law for a period of one year

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[1] Memorandum Supporting Motion to Confirm Referee's Report 3-4.

commencing November 1, 1984, ultimately effective January 5, 1985.[2]

That year petitioner moved to California, where his habits of community service have continued. He has no intention to return to, or practice law in, New York. Instead, he has earned his living in banking, becoming chief executive officer of a significant and successful national bank. As a result of the second grievance proceeding involved here, the one-year suspension was extended into the 1990s, ending on February 10, 1992, with the order of disbarment now in question.

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[2] The Special Referee hearing the matter had found as "OTHER MITIGATING FACTORS":

> 1. The submission of the false document (Charge One) appears to be an isolated instance. Counsel for Petitioner stated that there were "no other documents where there are fictitious names to their knowledge" (193) see also 432.
>
> 2. The hospital accepted Petitioners [sic] Exhibit One, knowing that the names were false.
>
> 3. There is no evidence that Respondent profited monetarily from this deception.
>
> 4. I believe that he was motivated solely by a desire to preserve the anonymity of the adopting parents.
>
> 5. There is no evidence in this record that anyone was actually damaged by submission of the false document.
>
> 6. He eventually did disclose the true names to the authorities.
>
> 7. His otherwise unblemished record (so far as the evidence before me revealed) of more than twenty years at the Bar.

Institution of the Second Proceeding

Late in 1985 an attorney in the Office of the Comptroller of the Currency ("OCC") advised the Grievance Committee that two documents filed with the OCC by petitioner -- one in July 1983, the second in September 1984 -- had failed to disclose the facts concerning the first grievance proceeding. Almost three years later, in April 1988, the Grievance Committee commenced this proceeding, alleging that the two statements had been false and that by filing them petitioner had violated the disciplinary rules.

Sufficiently summarized for present purposes, petitioner's defenses included, *inter alia*, a denial that the first document had been false at all;[3] an assertion that the inaccuracy of the second document had been the result only of inadvertence;[4] and, more broadly, a contention that the OCC had at all material times been advised fully of the material facts in oral

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[3] The first paper, submitted to the OCC in July 1983 for approval of petitioner's functioning as an "organizer" and "director" of a proposed national bank, called for information as to any "disciplinary proceedings," giving as examples "Disbarment, censure of conduct, revocation of license, etc." There had at the time been no disposition of the first proceeding; petitioner, who has stated that he acted on advice of counsel, wrote "NONE," but then added, on his own second thought, "except for nominal fee dispute inquiries and a 1975 question of whether or not there was a violation of compact law, all of which have resulted in no action." The reference to the "1975 question . . . of compact law" was to the adoption matter, in which a pending charge, later dismissed, involved alleged violations of an Interstate Compact on the Placement of Children.

[4] Petitioner testified that this September 1984 filing, also predating the order of suspension, was supposed to duplicate the first in the relevant portion, but the "except" clause was omitted through a clerical error. Petitioner denied that he made or caused the deletion, pointing out that he would have had no reason to excise information already before the OCC in the 1983 filing (Tr. 253). "Tr." refers to the Referee's Hearing transcript.

interviews that followed the formal paper filings. In support of this position, petitioner pointed out that the OCC, which was fully aware of (and in fact supplying) the evidence in the state bar grievance proceeding, had never moved to rescind the approval of petitioner's bank positions to which the filings related or taken any other adverse action.

The Hearing

The sole witness against petitioner in the hearing on the charges was Donald N. Lamson, Assistant Director of the Securities and Corporate Practice Division of the OCC. He and the OCC supplied substantially all of the documents introduced in support of the Grievance Committee's case. Counsel for the Grievance Committee had arranged in advance for the presentation of this testimony and the exhibits (Tr. 137-38). Prior to taking the stand, when reference was made to petitioner's subpoena calling for OCC documents, Mr. Lamson joined in a colloquy of counsel to tell the Referee there was "substantial case law that in fact shows that the Federal Government is not subject to State Court subpoenas." (Tr. 68-69.) He volunteered that he had brought some documents "in the interests of justice and for the convenience of the parties," but maintained that "the Comptroller's Office is clear that they do not submit to the subpoena itself" (Tr. 69).

Sworn then as a witness, Mr. Lamson testified that he had access to all OCC files relating to national banks (Tr. 72), and that he had "committed . . . to memory" OCC charter application procedures, which appear in a manual "about four inches thick" (Tr. 73). He described the chartering process, and reported that a charter had been issued to the American Commercial National Bank of California ("ACNB") (Tr. 74-75). Mr. Lamson testified that petitioner Garner had been approved as a director of the ACNB after a field interview,

investigation, and submission of a confidential biographical and financial report (Tr. 76-80).

Further investigation was necessary when Garner applied to become the bank's chief executive officer (Tr. 80-82). During his direct testimony, Lamson tendered a redacted OCC memorandum on this subject (Tr. 81-83), noting that he had done the redaction "personally, . . . in light of the office's need to maintain the confidentiality of that information." (Tr. 82.) When petitioner's counsel objected and asked the Referee to look at the unredacted original for voir dire purposes, the Referee declined "to inspect anything that has not been offered and admitted in evidence." (Tr. 82-83.) The witness volunteered that it would be "a violation of Federal law" for him to provide the unedited memorandum, and that he had not brought it with him in response to petitioner's subpoena (Tr. 83-84). He provided the redacted version, he said, as an accommodation, repeating his view that petitioner's subpoena, without a motion to quash, was "not applicable to a Federal Government agency" (Tr. 84).

Mr. Lamson would not say what had been deleted from the memorandum (Tr. 83). When counsel demanded compliance with the subpoena for the original, there having been no motion to quash, the Referee asked:

> The question is, what do you want me to do? Do you want me to have him committed to contempt of this court?

(Tr. 85.) When counsel pressed for an order requiring Lamson to bring the original document, the Referee said he could not do that, and would receive the redacted document in evidence over petitioner's objection:

> He is not going to obey my order because he has already said the Federal agencies are not subject to any [sic] jurisdiction, and he is appearing

only as a Federal agent, and I am not going to make any such order.

I will keep in mind the circumstance that there has been a redaction when I write my eventual report.

In the meantime, I will accept it the way it is.

(Tr. 87.)

Lamson went on to say the exhibit related to petitioner's application to become CEO of the bank and that the OCC had not disapproved petitioner for that post:

Q. So what was contained in this document did not induce you to disapprove him?

A. Exactly.

Q. And that I assume would include whatever material was redacted?

A. Absolutely.

(Tr. 87-89.)

On cross-examination, Lamson was led to acknowledge that his testimony that petitioner's 1984 application had not been disapproved, which was based on the documents he provided, might have been mistaken (Tr. 135-36). It was then established without dispute that the 1984 application about which Lamson had testified did relate to petitioner's becoming president and CEO of the bank, and that the application had in fact been disapproved by the OCC (Tr. 187-88).[5]

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[5] After the bank had been established for over two years and OCC (continued...)

In other cross-examination, Lamson testified that his litigation "counterpart" in the OCC had "instructed" him to ignore the subpoena because an "agreement had been reached that the subpoena would not be enforced since it was a State Court subpoena" (Tr. 106.) Petitioner's counsel denied, and there was never any evidence of, any such agreement (Tr. 86, 107). Asked whether he had brought to the hearing documents responsive to petitioner's subpoena, Mr. Lamson resisted, and the Referee identified the word "responsive" as "a naughty term" (Tr. 112). It became evident that there had not been compliance with the subpoena, in accordance with the witness's position that compliance was unnecessary, and petitioner's counsel protested that the document production had been made "on a selected basis" (Tr. 112-16, 139, 145-46).

Lamson was asked, as the beginning of a line of cross-examination, whether there had come a time when the OCC decided that information in petitioner's filings might have been inaccurate (Tr. 121). He "respectfully" declined to answer. When counsel urged that this went "to the heart of the proceeding," the Referee said he must accept the refusal to answer because he could not compel an answer (*id.*). He added, "And let us not play games." (Tr. 122.) Similar inaction by the Referee followed a further series of refusals to answer questions concerning:

- Contacts between the OCC and the Grievance Committee (Tr. 122-123).
- When OCC had ascertained that information in petitioner's submissions might contain "incomplete or misleading information" (Tr. 123).

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[1](...continued)
approval was no longer required, petitioner came to serve as president and CEO of the bank at various times (Tr. 187-88).

- The circumstances under which the OCC found asserted inaccuracies in the filings (Tr. 125-26).
- What action, if any, was taken by the OCC as a result of information gleaned from the file respecting petitioner (Tr. 126).
- Who at OCC determined that petitioner might have given incomplete or misleading information (Tr. 128).
- Whether there had been any OCC discussions of the biographical information given by petitioner (Tr. 128).
- Whether proceedings had ever been instituted to remove petitioner as the bank's CEO (Tr. 130, 131).
- Whether the OCC had ever sought penalties from petitioner (Tr. 132).
- Whether any cease and desist proceedings had ever been instituted by the OCC against petitioner (Tr. 132).

In the course of Mr. Lamson's refusal to answer cross-examination questions, he mentioned that he had been required to obtain a letter of authorization in order to testify at all. At the request of petitioner's counsel, the letter was marked as an exhibit. Signed by a Senior Deputy Controller for Bank Supervision (Operations), the letter reads as follows:

> Dear Mr. Lamson:
>
> The New York State Grievance Committee for the Ninth Judicial District, in connection with pending disciplinary proceedings against a member of that bar, Mr. Gerald J. Garner, has requested that the OCC provide it a witness to testify concerning the circumstances surrounding the existence of multiple copies of documents

> filed with the OCC and concerning the procedures for seeking approval from the OCC to be a director and/or Chief Executive Officer of a national bank, and the documentation involved in such applications.
>
> You are hereby authorized, pursuant to 12 C.F.R. §§ 4.18 and 4.19, to testify at the hearing concerning this matter with respect to the above-referenced topics.[6]

Counsel for petitioner urged upon the Referee his inability to cross-examine effectively if "any of these areas" remained closed because of Lamson's asserted restriction on his authorization to come voluntarily to testify (Tr. 125). The Referee recognized that the impact, if any, of petitioner's allegedly false statements was indeed "the principal question" in the proceedings (Tr. 126-27). Nonetheless, he declared that "there is no use" and instructed counsel to "move along" (Tr. 127).

The Referee's Report

The Referee, who had been assigned by the New York Appellate Division, Second Department, to "hear and report," issued a Report dated July, 1991 (2a). He noted at the outset as a "troublesome aspect" that the lengthy proceedings had "transformed [petitioner's] 1-year suspension . . . into . . . an

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[6] 12 C.F.R. § 4.18(a) forbids employees to disclose "confidential information," except as authorized. Section 4.19 bars employees "from testifying in court . . . without the prior written authorization of the Comptroller." Neither the letter nor any other document in evidence defines the scope of "confidential information" or states that cross-examination on the topics to which the letter refers should be refused after direct testimony has been given.

almost 7 year suspension." (*Id.*) He urged that the proceedings "be brought to a prompt conclusion" (*id.*).

The Referee found that both the 1983 and the 1984 filings by petitioner had contained false answers to the question about disciplinary proceedings, and that none of petitioner's defenses was meritorious. He noted in mitigation petitioner's "impressive record of past and present community activities and ample evidence of good character," quoting from the Appellate Division's prior decision in *In re Garner*, 103 A.D.2d 390, 392, 480 N.Y.S.2d 127, 128 (2d Dep't 1984), and the continued vitality of those characterizations (10a). He mentioned also that the OCC, knowing the facts, had not found the charges to be "of sufficient gravity to offset respondent's character and quality to be the chief executive office [sic] of what has grown to be a significant and successful National Bank." (*Id.*) But he found the charges to be sustained.

In resisting that conclusion, petitioner's counsel had preserved throughout the contention that the hearing had been unfair because of (i) the failure to effect compliance with his subpoena to the OCC, and (ii) the curtailment of his cross-examination resulting from the permitted refusal of the sole witness Lamson to answer questions bearing upon what the Referee had described as "the principal question" in the case. Prior to further briefing and argument to the Referee, at the close of the hearing petitioner's counsel moved unsuccessfully to strike Lamson's testimony on the ground that "he did not comply with the subpoena of [the] court, and he did not submit himself to cross-examination." (Tr. 307.)[7]

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[7] Petitioner also raised this due process argument in his post-trial memorandum. Respondent Gerald J. Garner's Post-Trial Memorandum 33-36.

PUBLISHER'S NOTE

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see also Greene v. McElroy, 360 U.S. 474, 496-97, 506-07 (1959).

In this case, the petitioner's right to cross-examine was gutted by permitting the single witness to refuse to answer questions that were recognized by the presiding judicial officer to be highly relevant to petitioner's defense. The Referee's acceptance of these refusals rests upon the clearly mistaken notion that a federal employee appearing in a state tribunal has a supreme right to determine what questions he will answer merely by his conversational announcement that the inquiries move into privileged terrain. The Referee's professed helplessness to require proper cross-examination answers, or to exclude the direct testimony, involves a tissue of misconceptions, and conflicts with other cases, discussed below. These misconceptions trigger questions of substance for this Court's consideration. The case as a whole is, in petitioner's submission, a significant one for review by this Court.

2. The procedure followed in this case is in conflict with the basic principle that when government officers (or the Government *eo nomine*) come voluntarily to court, they submit themselves to the procedures and rules that bind others. Enforcing the principle, and rejecting an attempt by the government to invoke a special procedure of mandamus or prohibition to attack a trial court's discovery orders in a case where the Government was sued with its consent, Judge Augustus Hand wrote for the Second Circuit:

> It has been the policy of the American as well as of the English courts to treat the government when appearing as a litigant like any private individual. Any other practice would strike at the personal responsibility of governmental agencies which is at the base of our institutions.

Bank Line v. United States, 163 F.2d 133, 138 (2d Cir. 1947). The principle stated by Judge Hand applies in state as well as federal courts.

Accordingly, coming closer to this date, when the United States has proceeded in state court for an adjudication of its water rights, it has "admitted that it must abide by all state procedures that permit a fair determination of federal reserved water rights or risk losing them." *United States v. Bell*, 724 P.2d 631, 644 (Colo. 1986). *See also United States v. District Court*, 121 Utah 1, 15-16, 238 P.2d 1132, 1139 (1951), *rehearing denied*, 121 Utah 18, 242 P.2d 774 (1952); *Green River Adjudication v. United States*, 17 Utah 2d 50, 52, 404 P.2d 251, 252 (1965) (United States "bound by the judgment to the same extent as any other party"). The contrasting conception accepted by the New York courts in this case -- that the court must accept, without inquiry and without remedy for the private litigant, a federal employee's declaration of privilege -- should be considered and corrected by this Court.

The idea of so dominant a role for a federal employee testifying in a state court is a caricature of "'Our Federalism.'" *See Younger v. Harris*, 401 U.S. 37, 44 (1971). In *Younger*, as in other settings, this Court has been astute to enforce "a proper respect for state functions," recalling from the founding of the Republic "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Id.* As against that fundamental premise, the courts below have enforced a self-denying ordinance of simplistic federal supremacy entitling a federal civil servant to dictate whether and how he may be cross-examined after supplying state disciplinary enforcers with his direct testimony. This unwarranted deference is profoundly objectionable, and intensely misconceived as a matter of

constitutional law, when the result is to trample upon the rights of individuals.

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.

New York v. United States, 112 S. Ct. 2408, 2431 (1992).

3. Though not discussed by the New York appellate courts or explained by the Referee, his mechanical acceptance of the federal employee's refusals to answer rests upon a swollen conception of federal administrative supremacy that calls for correction by this Court and further explication of this Court's pertinent decisions. Specifically, such basic precedents as *Boske v. Comingore*, 177 U.S. 459 (1900), and *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), among others, are distorted and over-extended by the unqualified power given to the federal witness to answer or not answer based upon his own untested judgments of confidentiality.

Boske v. Comingore is a germinal decision to revisit in correcting the decision below. That case established at the outset of the twentieth century that (i) a department head could lawfully preserve by regulation the confidentiality of departmental records, and (ii) a subordinate employee, called as an involuntary witness, could not be compelled by a state court to produce records in violation of the regulation. *Touhy v. Ragen* applied the same rule against similar coercion by a federal court. Neither those decisions nor any other supports the notion that a federal employee may be unleashed as a witness appearing voluntarily, and then have his selective

assertions of confidentiality accepted without scrutiny by the judicial officer before whom he testifies. On the contrary, related decisions on claims of federal privilege make plain that the Referee in this case abdicated judicial power to test such claims and neglected the duty to do so when a person's right to due process is at stake.

Even when the President of the United States asserts a settled form of executive privilege, the particular assertion must pass the test of judicial assessment and be rejected if it fails. *See United States v. Nixon*, 418 U.S. 683 (1974). The President himself is not free to withhold relevant evidence by invoking a "broad, undifferentiated . . . generalized . . . interest in confidentiality." *Id.* at 706-07. In submitting to the test, the President must make assertedly privileged papers available for judicial inspection -- contrary to the Referee's view in this case that he could not even look at subpoenaed papers because they were not "in evidence" (Tr. 83). Despite the "high respect to the representations made on behalf of the President," *id.* at 707, and the "presumptive privilege for Presidential communications," *id.* at 708, the interests of justice require a judicial weighing of the need for confidentiality against the need for the evidence. The "undifferentiated claim of public interest in [Presidential] confidentiality," *id.* at 706, must be weighed against the claims of due process, under which "it is essential that all relevant and admissible evidence be produced," *id.* at 711.

More recently, dealing with a similar claim of confidentiality, the Court has again noted the need for judicial scrutiny because "the privilege that has been held to attach to intragovernmental memoranda clearly has finite limits, even in civil litigation." *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1973).

Similarly, in the context of the "informer's privilege" -- the qualified right of the government to withold the identity

of confidential sources of information in order to preserve the flow of information to the government, seemingly a policy Lamson professed to be protecting in these proceedings -- the Court has stressed that "[t]he problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro v. United States*, 353 U.S. 53, 62 (1957) (holding denial of disclosure of informant's identity to be reversible error). *See also Hampton v. Hanrahan*, 600 F.2d 600, 637 (7th Cir. 1979) (reversible error to fail to apply *Roviaro* balancing), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 769 (D.C. Cir. 1965) (rejecting argument that "the *Roviaro* standard would never justify disclosure in civil cases in which the Government is not a party. . . . The policies behind the [informer's] privilege and its exceptions extend to civil as well as criminal cases.").

The same is true with respect to the cognate subject of military and state secrets. Again, in that setting this Court has affirmed that "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *United States v. Reynolds*, 345 U.S. 1, 9-10 (1953). "The court itself must determine whether the circumstances are appropriate for the claim of privilege." *Id.* at 8. "In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate." *Id.* at 11. Those principles were stated with respect to a specific claim of privilege by a cabinet officer.

The rulings of the Referee in this case, sustained by the Appellate Division and denied review by the Court of Appeals, cannot be reconciled with the quoted principles. Indeed, the contexts in which those principles were announced presented far more compelling cases for judicial deference to assertions of privilege. The witness appearing here, without

compulsion, was far below the agency head, who had no occasion to consider the specific refusals to answer questions on cross-examination. The Referee never examined the claimed need for confidentiality and made no attempt to weigh the opposing need for the evidence -- in a word, overrode the right of cross-examination on the witness's naked refusal to answer.

Similarly, as to the subpoenaed documents, the employee simply consulted with a colleague, made no effort to quash, brought those he deemed suitable, did some unexplained redacting, and otherwise defied the subpoena. Exercising no judgment whatever, the Referee yielded to the decisions of the employee, even while recognizing the relevance of the evidence thus withheld.[10] The result is a record made in a perverse violation of due process.

It is improbable that Lamson's claims of confidentiality would have survived a few moments of rational judicial inquiry.[11] But these are details not suited for submission to this Court; the issues on which review is sought go to the failure to make any inquiry whatever. In his cursory rejection

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[10] The unanswered questions, the Referee observed, went to the "principal question" in the case (Tr. 126-27). This was clearly correct. The Appellate Division -- with broad authority both to determine culpability and to adjudge sanctions ranging from censure to disbarment, N.Y. Jud. Law § 90(2) (McKinney 1983 & Supp. 1992) -- should undoubtedly have been interested to know whether the OCC had actually been misled, whether the oral encounters to which petitioner testified had in timely fashion obviated any possibility of deception, and whether the OCC itself had foregone any adverse action because it concluded on balance that there had been neither deception nor an intent to deceive.

[11] Consider, for example, the refusals to say when or if the OCC had ascertained that petitioner had given misleading information; what action, if any, the OCC had taken against petitioner; whether there had been any steps to remove petitioner as CEO of his bank; and whether penalties had ever been sought against petitioner.

of that course, the Referee once again ignored the need to weigh the competing interests, leaving the decision to the one-sided disposition of a subordinate employee. If a responsible agency head had addressed the question, as was required, *see Reynolds*, 345 U.S. at 7-8, and had found a concern about the leakage of confidences in relevant cross-examination, that might fairly have led to resisting any direct examination to begin with -- not to the cavalier allowance of prosecutorial direct while planning to refuse cross. *See Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1143-44 (5th Cir. 1992); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236 (4th Cir. 1985). No responsible agency head proposed such unfairness here; the judicial sanctioning of the procedure merits examination by this Court in light of the divergence from state and federal precedents just cited.

4. In refusing to strike the direct testimony when the witness was permitted to withhold relevant evidence on cross-examination, the Referee's rulings are in essential conflict, both in result and lack of reasoning, with an array of state and federal decisions. For example, in *State v. Tascarella*, 580 So. 2d 154 (Fla. 1991), when Federal Drug Enforcement agents refused to give deposition testimony in a criminal prosecution, the trial court ordered the agents barred from testifying for the prosecution at the trial. Rejecting the State's appeal and holding the order a proper exercise of discretion, the Florida Supreme Court said: "It has long been held that states have full control over the procedural rules in their courts, in both civil and criminal cases." *Id.* at 156. That principle should have been followed, and a comparable result reached, in this case.

The denial of the motion to strike likewise diverges from the principles and rulings of federal cases dismissing both civil and criminal proceedings when the government insists upon its right to withhold relevant evidence. *United States v.*

Cotton Valley Operators Comm., 9 F.R.D. 719 (W.D. La. 1949), *aff'd by an equally divided Court*, 339 U.S. 940 (1950) (civil antitrust); *United States v. Rhodes*, 360 F.2d 865, 866-67 (7th Cir. 1966); *United States v. Andolschek*, 142 F.2d 503, 506 (2d Cir. 1944) (L. Hand, J.).

5. The case is important. Despite the routine disposition and the silence below, the procedure employed against petitioner flatly transgressed the principles laid down in decisions of this Court cited earlier. Beyond the necessity for specific corrections in this respect, this is a useful occasion for further resolution of interrelated problems of federal privilege, state judicial power, due process, and federalism briefly outlined in the foregoing argument.

CONCLUSION

This petition for a writ of certiorari should be granted. Because the constitutional issues were neglected by both of New York's appellate courts, the case may be appropriate for summary disposition vacating and remanding for consideration of these issues.

Respectfully submitted

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December 1992

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of Gerald J. Garner,
a suspended attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Petitioner,

GERALD J. GARNER,

Respondent.

REPORT OF REFEREE,
W. BERNARD RICHLAND

Gary L. Cassella,
Chief Counsel, Grievance Committee, Petitioner
by Sondra S. Holt,
Of Counsel

Morrison & Foerster, Attorneys for Respondent,
by Barrington D. Parker, Jr.,
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of Gerald J. Garner,
a suspended attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Petitioner,

GERALD J. GARNER,

Respondent.

Gary L. Cassella,
Attorney for Petitioner,
by Sondra S. Holt,
Of Counsel

Morrison & Foerster,
Attorneys for Respondent,
by Barrington D. Parker, Jr.,
Of Counsel

REPORT OF REFEREE

W. BERNARD RICHLAND, Referee

By order dated February 1, 1991, the Court designated the undersigned as a successor Special Referee "to hear and report" in a proceeding to discipline Respondent who was admitted to practice as an attorney and counselor at law by the Court on March 29, 1961. The Special Referee originally designated was relieved on his request when he became a Justice of the Supreme Court. The subject matter of the proceeding is two

charges of professional misconduct, each of which will be considered separately.

Before that, a special note:

A TROUBLESOME ASPECT OF THIS PROCEEDING

In this proceeding, a straightforward question of fact has transformed a 1-year suspension ordered by this court into—to this date—an almost 7 year suspension. It has engaged the efforts of three major law firms and, as counsel, a former Justice of this Court, two special referees and the staff of the Grievance Committee; all in what might appear to be an improvident use of judicial attention and legal energy and talent—particularly since respondent's present counsel noted at one stage in the hearings before the predecessor Special Referee, "Mr. Garner is a suspended attorney. He is not living or residing here, he is not practicing law in this or any other jurisdiction. As I understand it, he has really no intention of returning to New York or of reapplying." (43)[1] This proceeding, it is recommended, should be brought to a prompt conclusion.

The Proceeding

(1)

By order dated October 1, 1984, this Court found respondent "guilty of serious professional misconduct" *Matter of Garner*, 103 AD 2d 390 (1984), and suspended him from the practice of law "for a period of one year, commencing November 1, 1984, and continuing until the further order of this Court, with leave to respondent to apply for reinstatement after said period of one year." (Pet'r Exh. 6).

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1 Reference to Minutes of Hearing.

(2)

The proceeding which resulted in the suspension order was instituted by the Grievance Committee by petition verified March 31, 1981 and served on respondent April 15, 1981 (Pet'r Exh. 1). That petition was amended by Amended Petition verified July 2, 1981 and served on respondent August 12, 1981 (Pet'r Exh. 3). The Amended Petition set forth ten charges, five of which were later withdrawn. Hon. Aaron Kooter, the Special Referee appointed by the Court to hear and report on the charges, filed his report with the Court dated January 25, 1984, sustaining only a portion of one charge and one entire charge—all relating to a single transaction in regard to an infant adoption which took place in California. (Pet'r Exh. 5).

(3)

While the Grievance Committee proceeding was going on, respondent, who had moved to California, was involved in the organization of the American Commerce National Bank, to be located in Anaheim Hills, California, and applied to the Office of the United States Comptroller of the Currency (hereinafter "O.C.C.") for approval as "organizer" and "director" of the proposed National Bank, in connection with which the matter he submitted a "Confidential Biographical and Financial Report", dated June 30, 1983. (Pet'r Exh. 7).

That report contained the following under Part A, section 4, (d) (*Id.* at page 6):

> "(d). Provide the following information regarding each disciplinary proceeding or action of which you are, or have been, the subject, with respect to any professional license you hold or have held. Examples: Disbarment, censure of conduct, revocation of license, etc.
>
> | *Name of Authority* | *Nature of Proceedings* | *Disposition and Date* |
> |---|---|---|
>
> NONE—except for nominal fee disputes inquires and a 1975 question of whether or not there was a violation of compact law, all of which have resulted in no action."

(4)

By letter to O.C.C. in connection with an application to add to his status in the Bank dated September 24, 1984, respondent submitted a purportedly "re-dated and resigned biography" (attached to Pet'r Exh. 9A) in which xeroxed signature page 14 of Pet'r Exh. 7 was amended in handwriting by respondent, "resigned and up to date 9/23/84;" and xeroxed page 1 of Pet'r Exh. 7 was amended delete the "X" from the word "Organizer" and insert an "X" in the space for "officer." Page 6, item d of Exh. 9A is not identical with page 6, item d of Pet'r Exh. 7 quoted above; the entire text of the response in item d in Exhs. 9, 9A and 14 is, "NONE," the qualifying language, "except for" etc. is omitted.

(5)

On November 12, 1985, a Senior Attorney in the Securities and Practice Division of O.C.C. telephoned the Office of the Grievance Committee and spoke to an Assistant Counsel. He apparently had come across the 1984 decision of this Court suspending respondent, reported in *Matter of Gerald J. Garner*, 480 N.Y.S.2d 127, and asked to see the record on the basis of which the suspension was ordered. (Resp. Exh. F).

Apparently, because of what the Assistant Counsel learned in that conversation, the Grievance Committee "opened a sua sponte complaint in December of 1985 against the respondent based on the filings with the Comptroller of the Currency," but was unable to prepare a formal petition in disciplinary proceedings until April, 1988, because respondent said he did not have copies of the "filings," that is, "documents submitted . . . by Mr. Garner in connection with his application for a [bank] charter . . . which contained false information," and the O.C.C. did not release such copies until May, 1987 (45-46, and Resp. Exh's. G, H and I).

The Petition and Answer

The Petition, verified April 4, 1988, was served on respondent May 26, 1988. An unverified answer dated August 19, 1988 was, on that date, served on petitioner.

The petition asserted that, in two separate instances, respondent was guilty of filing a false written statement. In each charge, petitioner alleged the earlier 1983 disciplinary proceedings, its origin, development, hearings, Referee's report, and decision of the Court suspending respondent.

In Charge I, the petitioner alleged that, in a "Confidential Biographical and Financial Report" dated June 30, 1983, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 3 of The Proceeding, supra at pp. 3-4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

In Charge II, the petitioner alleged that in a "Confidential Biographical and Financial Report" dated September 23, 1984, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 4 of The Proceeding, supra at p. 4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

The unverified Answer denied the conclusionary allegations and denied knowledge or information sufficient to form a belief as to the allegations that the identified "Confidential" etc. "Reports" were submitted by him to the O.C.C., and admitted the 1981 disciplinary proceeding and his one-year suspension from the practice of law.

PRIMA FACIE PROOF OF THE CHARGES

The "Confidential Biographical and Financial Reports" admittedly submitted by respondent to the office of the United States Comptroller of the Currency and the uncontroverted record of the 1981 disciplinary proceeding, taken together, constitute *prima facie* proof of Charge I and, *a fortiori*, Charge II.

CHARGE II

We first address Charge II, which relates to a flat answer "NONE" to a request for information in regard to any "disciplinary proceeding" in which respondent was or had been "subject in respect to any professional license you hold" *Pet'r Exh. 9, Part A, Section 4, (d), at p. 6.*

Plainly, there was and had been a "disciplinary proceeding" of which respondent had been "the subject." Indeed, that proceeding had been on since 1981, it related to a series of significant charges of professional misconduct, there had been hearings over several days before a Special Referee who had then filed his Report to this Court and a copy of it was in respondent's hands. That Report found respondent guilty of some of the charges and the Report was under consideration by this Court at the time when that "Confidential" etc., "Report" was submitted to the United States Comptroller of the Currency by Respondent in September, 1984. "Biographical and Financial Reports" substantially identical to Pet'r Exh. 9 were then submitted to two Field Offices of the Comptroller of the Currency (Pet'r Exh. 9A and Pet'r Exh. 14).

The response "NONE" to Part A, Section 4 (d) in each of the "Confidential and Biographical and Financial Reports", Pet'r Exhibits 9, 9A, and 14, is false, and those Reports were submitted to a United States Government Agency in connection with the establishment and the operation of a National Bank.

CHARGE I

Charge I relates to Part A, section 4, (d) of the "Confidential Biographical and Financial Report" submitted to the Comptroller of the Currency in June, 1983 and is set forth in subdivision 3 of The Proceeding, *supra*. In response to request for information in regard to any "disciplinary proceeding" in which "you are or have been the subject in respect to any professional license you hold" (Pet'r Exh. 7 at page 6), respondent answered "NONE—except for nominal fee disputes inquiries and a 1975 question of whether or not there was a violation of a compact law, all of which have resulted in no action."

Although at the time respondent submitted the "Confidential Biographical and Financial Report," there was and had been pending against him for more than two years an attorney "disciplinary proceeding" in which respondent was and had been "subject in respect" to his "professional license" as an attorney, he answered "NONE–except," made no reference to the "Nature of Proceedings" in which he was involved, and, after making an unenlightening description "nominal fee disputes inquiries" and, similarly unenlightening, "question of whether or not there was a violation of a compact law," stated "all of which has resulted in no action," when in fact there had been a great deal of "action" in an ongoing "disciplinary proceeding" and a Special Referee had submitted a Report to this Court finding him guilty of professional misconduct.

The response by respondent to the request for information in Part A, Section 4, (d) of the "Confidential" etc. "Report" made to a United States regulatory agency in connection with the establishment of a National Bank, was so lacking in candor, so arch and unenlightening as to amount to misleading and grossly inaccurate.

Legal and Factual Defense

(a)

Respondent offers as a legal defense to the Charges that he was not required to disclose the 1981 disciplinary proceeding because under Judiciary Law section 90, subd. 10, it was sealed and deemed confidential. (Respondent's Post-Trial Memorandum Point I) But respondent claims that he disclosed the pending disciplinary proceeding by his grossly misleading answer in the 1983 "Confidential" etc. "Report" and flatly and falsely denied the existence of any disciplinary proceeding in the 1984 "Confidentially" etc. "Report." Judiciary Law section 90, subd. 10, does not grant an attorney a license to mislead, falsify and lie.

(b)

Respondent offers as a legal defense to the Charges that because an employee of the Office of the Comptroller of the Currency,

called as a witness, refused to go beyond the extent to which the Comptroller of the Currency authorized him to respond to the Subpoena Duce Tecum served on that office (121-123), the O.C.C. as a Federal agency being not subject to the State Court Subpoena, *Sharon* v. *F.E.R.C.*, 691 F.Supp. 381 (1988), and cases therein cited.

Significantly, respondent made no objections to the receipt in evidence of the certified copies of relevant "Confidential" etc. "Reports" which the witness produced (91, 94, 96) and which support the charges. Nevertheless, he asks that they be excluded.

(c)

Respondent offers as justification for the false and misleading statements contained in the "Confidential" etc. "Reports" submitted by him to the Office of the Comptroller of the Currency in connection with the organization and operation of a National Bank, that he did so on advice of his long-dead counsel. He testified that in 1983 he discussed the "Confidential" etc. "Reports" (Pet'r Exh) with his counsel who advised him that the "appropriate answer" to the request for information as to any "disciplinary proceeding . . . of which you are or have been subject with respect to any professional license you hold" was "NONE" but that he should send him the question "so he could inspect it" (223-24). And, "I sent him the whole confidential report . . . finally, several days after . . . he called back to my secretary and said that to tell me that the 'NONE' was the appropriate answer" (224).

We have long been taught to be most dubious of the accuracy of statements attributed to a person who is no longer alive, (2 Wigmore, Evidence section 578 and old CPA section 347 and 5 Weinstein Korn & Miller *New York Civil Practice*, p.p. 45-451 to 45-461), and the late Erwin Shapiro, a former Justice of this Court is the lawyer who supposedly gave respondent that peculiar advice. Significantly, Mr. Shapiro cautioned that he would have to see the document—the "Confidential" etc. "Reports"—before making up his mind, and respondent did not hear from Mr. Shapiro himself on the matter, but said he relied upon what his secretary said she had been told by Mr. Shapiro. Moreover, respondent him-

self had some reservations on the correctness of the "NONE" response: "I was not totally comfortable with adding 'NONE' and a dictation followed with my secretary where these additional words were put in" (224-25). And, "I would like to add a little more information. I am not comfortable with just putting in 'NONE' " (171).

The 1983 feeling of discomfort "with just putting in 'NONE' " seems to have moderated by 1984 when respondent filed the "re-dated and re-signed" "Confidential" etc. "Reports" in which the flat answer "NONE" appears in response to a request for information on any "disciplinary proceeding . . . of which you are or have been subject in respect to any professional license you hold." But in this regard, respondent testified that he really did not intend to delete the additional text after the word "NONE" (249). "Somebody took out everything after 'NONE' " (251). But there are three 1984 "Confidential Biographical . . . Reports," not identical with each other in several minor respects, but each giving the flat answer "NONE" to the "disciplinary proceeding" information request. (Pet'r Exhs. 9, 94, 14)

Matter in Mitigation

This Court, in *Matter of Garner*, 103 AD 2d 390, wrote of respondent's "impressive record of past and present community activities and ample evidence of good character." And, respondent has continued in that regard over the years since that decision.

There is also another aspect which may be considered by this Court in making its decision: the very significant fact that the Comptroller of the Currency has not found the circumstances which led to the present charges of sufficient gravity to offset respondent's charac'er and quality to be the chief executive office of what has grown to be a significant and successful National Bank. And under his leadership.

Moreover, as noted at the outset, respondent's one year suspension from practice imposed by this court has grown—so far—to almost seven years. Whether respondent shares with petitioner responsibility for this unfortunate fact is of limited significance. The lengthy suspension has already imposed great hardship on

respondent and vastly extended the punishment imposed by this court without its knowledge or consent.

CONCLUSION

The Charges are sustained.

Respectfully submitted,

/s/ W. BERNARD RICHLAND
W. Bernard Richland,
Referee

July, 1991

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND JUDICIAL DEPARTMENT

90-07400

In the Matter of Gerald J. Garner, a suspended attorney admitted under the name Gerald J. Goldberg.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Petitioner,

GERALD J. GARNER,

Respondent.

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
LAWRENCE J. BRACKEN
THOMAS R. SULLIVAN
CHARLES B. LAWRENCE, JJ.

OPINION AND ORDER

DISCIPLINARY proceeding instituted by the Grievance Committee for the Ninth Judicial District. The respondent was admitted to the Bar on March 29, 1961, at a term of the Appellate Division of the Supreme Court in the Second Judicial Department, under the name Gerald J. Goldberg. By order of this court dated October 1, 1984 (*Matter of Garner*, 103 AD2d 390, *amended* 107 AD2d 653), the respondent was suspended from the practice of law for a period of one year, effective January 4, 1985. To date, the respondent has failed to apply for reinstatement. By order of this court dated October 24, 1988,

the issues raised by the petition and the answer were referred to the Honorable Howard Miller, as Special Referee, to hear and report. By order of this court dated February 1, 1991, the Special Referee was relieved, at his request, when he became a Justice of the New York Supreme Court and W. Bernard Richland was designated as a successor Special Referee.

GARY L. CASELLA, White Plains, N.Y. (Sondra S. Holt of counsel), *for petitioner*.

MORRISON AND FOERSTER, New York, N.Y. (Barrington D. Parker, Jr., of counsel), *for respondent*.

PER CURIAM:

In this proceeding the respondent is charged with two allegations of professional misconduct. The Special Referee sustained both charges. The petitioner moved to confirm the report of the Special Referee and the respondent's counsel has submitted an affidavit and memorandum of law in opposition thereto.

Charge One alleges that the respondent filed a false written statement. On a Confidential Biographical and Financial Report dated June 30, 1983, submitted to the Office of the Comptroller of the Currency, an agency of the United States government, the respondent was asked to provide information regarding "each disciplinary proceeding or action of which you are, or have been, the subject." The respondent answered as follows: "None–except for nominal fee disputes inquiries and a 1975 question of whether or not there was a violation of a compact law, all of which have resulted in no action." In fact, a petition had been served upon respondent in 1981 and he was the sub-

ject of a pending disciplinary proceeding which ultimately resulted in his suspension on October 1, 1984, from the practice of law for one year effective January 4, 1985. The respondent then signed the report which contained the following certification:

> "I certify that the information contained in this Confidential Biographical and Financial Report has been carefully examined by me and is correct and complete, and acknowledge that any misrepresentation or omission of a material fact constitutes fraud in the inducement and is grounds for denial of a certificate authorizing the commencement of banking business and may subject me to other legal sanctions, including those provided by 18 U.S.C. 1001."

Thereafter, the respondent caused the report to be filed with the Comptroller of the Currency.

Charge Two alleges that the respondent filed a false written statement. On a subsequent Confidential Biographical and Financial Report dated September 23, 1984, submitted to the Office of the Comptroller of the Currency, an agency of the United States government, the respondent again answered the question referred to in Charge One in the negative, despite the fact that he remained the subject of a disciplinary proceeding. The respondent then signed the report, which contained the certification discussed in Charge One. Thereafter the respondent caused the report to be filed with the Comptroller of the Currency.

Based on the evidence adduced at the hearing, we find the respondent guilty of the misconduct outlined above. The petitioner's motion to confirm the report of the Special Referee is granted.

In determining an appropriate measure of discipline to be imposed, we have taken into consideration the respondent's prior disciplinary record, to wit, a 1978 Letter of Caution for engaging in a conflict of interest, a 1980 Letter of Admonition for neglecting a legal matter, and a one-year suspension for misconduct involving false statements on documents. The

respondent is guilty of serious professional misconduct. Accordingly, the respondent is disbarred forthwith.

MANGANO, P.J., THOMPSON, BRACKEN, SULLIVAN and LAWRENCE, JJ., concur.

ORDERED that the petitioner's motion to confirm the report of the Special Referee is granted; and it is further,

ORDERED that pursuant to Judiciary Law § 90, effective immediately, Gerald J. Garner, admitted under the name Gerard J. Goldberg, is disbarred and his name is stricken from the roll of attorneys and counselors-at-law; and it is further,

ORDERED that Gerald J. Garner shall continue to comply with this court's rules governing the conduct of disbarred, suspended, and resigned attorneys (22 NYCRR 691.10); and it is further,

ORDERED that pursuant to Judiciary Law § 90, Gerald J. Garner is commanded to continue to desist and refrain (1) from practicing law in any form, either as principal or as agent, clerk or employee of another, (2) from appearing as an attorney or counselor-at-law before any court, Judge, Justice, board, commission or other public authority, (3) from giving to another an opinion as to the law or its application or any advice in relation thereto, and (4) from holding himself out in any way as an attorney and counselor-at-law.

I, Martin H. Brownstein, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department do hereby certify that I have compared the copy with the original filed in my office on February 10, 1992 and that this copy is a correct transcription of said original.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of Court on February 10, 1992.

/s/ MARTIN H. BROWNSTEIN
Martin H. Brownstein
Clerk

COURT OF APPEALS
STATE OF NEW YORK

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventeenth day of September A.D. 1992

PRESENT,

HON. SOL WACHTLER, *Chief Judge, presiding.*

2-24 Mo. No. 374

In the Matter of Gerald J. Garner, a suspended attorney and counselor-at-law.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent,

GERALD J. GARNER,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, on the Court's own motion, that the appeal taken as of right be and the same hereby is dismissed, without costs, upon the ground that no substantial constitutional question is directly involved; and it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied.

/S/ DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

Supreme Court, U.S.
FILED
JAN 5 1993
OFFICE OF THE CLERK

No. 92-957

In The

Supreme Court of The United States

October Term, 1992

GERALD J. GARNER,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Was the Petitioner afforded Due Process?

2. Did OCC withhold relevant evidence or defy Petitioner's subpoena?

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TABLE OF CITATIONS

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No. 92-957

In The

Supreme Court of The United States

October Term, 1992

GERALD J. GARNER,

Petitioner,

vs.

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

This brief is submitted in opposition to the petitioner's application for a writ of certiorari to review an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, dated February 10, 1992 which confirmed the Report of the Special Referee and disbarred petitioner. Matter of Garner, 176 A.D.2d 26, 580 N.Y.S.2d 59 (2nd Dept. 1992). The Court of Appeals of the State of New York, by order dated September 17, 1992, dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question

directly involved, and denied petitioner's alternative motion for leave to appeal. Matter of Garner, 80 N.Y.2d 917 (1992).

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under Title 28 U.S.C Section 1257(a).

STATEMENT OF THE CASE

Respondent was charged with filing a false written statement, by filing or causing to be filed with the Office of the Controller of the Currency, an agency of the U.S Government, two confidential, biographical and financial reports in which he was asked to provide information regarding "each disciplinary proceeding or action of which you, are or have been, the subject." At the time these reports were filed, respondent was the subject of a pending disciplinary proceeding which resulted later in his suspension from the practice of law. Matter of Garner, 103 A.D.2d 380, 480 N.Y.S.2d 127 (2nd Dept. 1984). In each of the reports respondent answered falsely, and signed the reports which contained certifications that the reports has been carefully examined and were correct and complete, and acknowledging that any misrepresentation of admission of a material fact constituted a fraud in the inducement and was grounds for a denial of a certificate authorizing the commencement of banking business as well as subjecting him to other legal sanctions. The Special Referee appointed to hear and report by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department found that both charges had been proved. The Supreme Court of the State of New York, Appellate Division, Second Judicial Department, which had the benefit of the entire record to review, by order dated February 10, 1992, sustained the report of the Special

Referee and disbarred petitioner [Matter of Garner, 176 A.D.2d 26, 580 N.Y.S.2d 59 (2nd Dept. 1992)], who had been represented by counsel and afforded a full evidentiary hearing.

Petitioner made a motion to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department seeking leave to reargue his opposition to Respondent's motion to confirm the report of the special referee. By order dated June 18, 1992, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, denied the motion in its entirety. Matter of Garner, _ A.D.2d _ , _ N.Y.S.2d _ (2nd Dept.1992).

Thereafter, the Court of Appeals of the State of New York dismissed petitioner's appeal as of right, upon the ground that the appeal presented no substantial constitutional question involved, and denied petitioner's alternative motion for leave to appeal by order dated September 17, 1992. Matter of Garner, 80 N.Y.2d 917 (1992).

REASONS FOR DENYING THE WRIT

I.

Petitioner has been afforded due process.

Petitioner's claim on this petition, as well as in his motion to reargue in the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York, and in his motion to appeal as of right or his alternative motion for leave to appeal in the Court of Appeals of the State of New York is that he was denied due process of law in the conduct of the hearing. The gravamen of his argument is that he was denied the right of cross-examination by the admission of testimony of Donald Lamson, from the office

of the Comptroller of the Currency (OCC), at the hearing, and of compulsory process by the OCC's "refusal" to comply with a state court subpoena. He maintains that Respondent's case depended on the testimony of Mr Lamson, who, he claims, testified freely on direct examination, but refused to answer on cross-examination. Respondent takes exception to this characterization of the witness' testimony, as well as Petitioner's reliance on its importance in support of his due process argument.

To the contrary, Respondent's case was not dependent on the testimony of Donald Lamson. As Special Referee, Bernard Richland so succinctly described in his report, the documents admitted into evidence and "admittedly submitted by respondent to the United States Comptroller of the Currency and the uncontroverted record of the 1981 disciplinary proceeding, taken together, constitute prima facie proof of . . ." the charges (6a).

Petitioner did not deny submitting the documents, and the existence of the previous disciplinary proceeding was also uncontroverted. Thus, the charges could have been sustained on the basis of documents alone. However, because of the existence of multiple copies of the 1984 OCC filing by Petitioner which contained slight differences, Petitioner's counsel raised an issue about the authenticity of the certified documents submitted in Respondent's case-in-chief (Tr. 75-83, 94 October 29, 1990).

Thereafter at the direction of Hon. Howard Miller, the former Special Referee in this matter, in order to protect Petitioner's due process rights, counsel for Respondent undertook to obtain certified copies of all documents submitted by Petitioner to the OCC. The explanation given to counsel by officials at the OCC for the existence of multiple copies appeared to be relevant to the proceedings in

light of the fact that Petitioner had raised this issue, and, therefore, counsel to Respondent made a formal request pursuant to OCC regulations that the OCC provide a witness at the hearing to explain the existence of these copies (12a-13a). The OCC also agreed to make available to all parties, for inspection in their offices in Washington, D.C., all original documents not deemed privileged or confidential.

Furthermore, the purpose of the testimony by OCC's representative was made clear at the hearing (Tr. 91 et seq. April 12, 1991). Mr. Lamson was able to clarify for the Special Referee the fact that submissions of the documents were made to more than one regional or district office of the OCC, thus explaining the existence of multiple copies, and was able to explain markings on the documents which showed in which office they were received. He also provided background information relevant to the charter and application process for national banks in accordance with Respondent's request and his authorization to testify.

Clearly then, Respondent's case was not even primarily dependent on Mr. Lamson's testimony as alleged by Petitioner. His testimony was merely ancillary and was intended to explain certain minor discrepancies in the documents which Petitioner never denied submitting.

Nor can Petitioner claim that his right to cross-examination was violated by the restrictions placed on Mr. Lamson's testimony pursuant to the Comptroller's regulations.

Petitioner had the right, and the opportunity, to make a formal request to the OCC, as Respondent did, for whatever testimony he deemed relevant to his case. The record is clear, however, that he failed to do so. (Tr. 137-138 April 12, 1991).

The very regulations which petitioner attempted to use in the course of the hearing as a shield in claiming that the documents admitted in evidence were illegally released by the Comptroller, he chose to ignore when confronted with their application in connection with Mr. Lamson's testimony. The witness made it abundantly clear that his testimony was limited by his letter of authorization from the OCC, under the OCC's regulations. 12 Code of Federal Regulations Section 4.19.

II.

OCC did not withhold relevant evidence or defy Petitioner's subpoena.

Petitioner alleges that the OCC "refused" to comply with a subpoena duces tecum served on it by Petitioner's counsel. 12 Code of Federal Regulations Section 4.19 further clarifies the OCC's position, as stated by Mr. Lamson at the hearing and as supported by case law, that the agency was not subject to a state subpoena. Yet petitioner persisted in claiming that his rights had been violated by OCC's "refusal" to comply with his subpoena.

Under the doctrine of sovereign immunity and as a general rule of Federal Law, Federal Agencies and their employees are not subject to state court subpoena power. Sharon Lease Oil Co., et al., v. Federal Energy Regulatory Commission, 691 F. Supp. 381 (Dist. of Columbia 1988); Environmental Enterprises, Inc. v United States Environmental Protection Agency, 664 F. Supp. 585 (Dist. of Columbia 1987). The same rule has been held applicable in instances in which the Federal agency in question has promulgated internal regulations regarding the release of documents and prohibiting its employees from testifying, as in the instant case. United States ex res. Touhy v Ragen, 340

U.S. 462 (1951).

The cases suggest that, when feasible, the agency cooperate with the state courts in carrying out their functions by producing certified copies of documents or otherwise assisting them. In the instant case, the OCC has done that and has allowed an employee to testify when a request was made by Respondent in conformity with the Comptroller's regulations.

In light of the OCC's cooperation with the Court and with the parties by providing the documents for inspection, and by their prompt reply to counsel for Respondent's requests for re-certification of the documents and for a witness to testify, it is patently clear that if Petitioner had simply followed the Comptroller's own regulations the problem he now complains of could have been obviated.

Counsel for Petitioner conceded in his affirmation in opposition to the motion to confirm the referee's report that counsel for Respondent had informed him that a witness from OCC would appear to testify at the hearing and would bring the documents with him. There is no evidence that Petitioner's counsel took any further steps to "enforce" the subpoena, other than a belated letter sent to OCC a few days before the hearing, and more than four months after the subpoena was issued (14a).

It has been, and continues to be, Respondent's position that the OCC did comply with Petitioner's subpoena. The addendum to the subpoena requests originals of Petitioner's 1984 and 1983 filings with the OCC as well as "Original correspondence, memoranda, interview notes and any other documents pertaining to the filing of the two confidential biographical and financial reports. . . "

The files produced at the hearing by Mr. Lamson were voluminous, and included the items referred to in Petitioner's addendum to his subpoena. Special Referee Richland allowed Petitioner's counsel to examine these documents and to use them for purposes of cross-examination without marking them as exhibits. (Tr. 66-69 April 12, 1991). Petitioner cannot claim a due process violation for his failure to avail himself of the opportunity afforded by OCC to examine the documents in their offices, and thereafter to request certified copies of documents they wish to introduce, or to provide a witness to testify in accordance with the Comptroller's regulations.

In sum, Petitioner has presented no question of law which merits review by this Court. The Petition for a Writ of Certiorari to the Appellate Division, Second Judicial Department of the Supreme Court of the State of New York should be denied. The issues raised herein were fully briefed in the proceedings below and in Respondent's Motion to Confirm the Report of the Special Referee, Reply Affirmation, and Memorandum of Law, all of which are a part of the record. Respondent respectfully refers the Court to those documents.

CONCLUSION

For the reasons stated herein, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Gary L. Cassella
Attorney for Respondent
Grievance Committee for the
Ninth Judicial District

Andrew L. Siegel
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of Gerald J. Garner,
a suspended attorney and counselor-at-law,

GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Petitioner,

GERALD J. GARNER,

Respondent.

REPORT OF REFEREE,
W. BERNARD RICHLAND

Gary L. Cassella,
Chief Counsel, Grievance Committee, Petitioner
by Sondra S. Holt,
Of Counsel

Morrison & Foerster, Attorneys for Respondent,
by Barrington D. Parker, Jr.,
Of Counsel

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION—SECOND DEPARTMENT

In the Matter of Gerald J. Garner,
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GRIEVANCE COMMITTEE FOR THE
NINTH JUDICIAL DISTRICT,

Petitioner,

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Respondent.

Gary L. Casella,
Attorney for Petitioner,
by Sondra S. Holt,
Of Counsel

Morrison & Foerster,
Attorneys for Respondent,
by Barrington D. Parker, Jr.,
Of Counsel

REPORT OF REFEREE

W. BERNARD RICHLAND, Referee—

By order dated February 1, 1991, the Court designated the undersigned as a successor Special Referee "to hear and report" in a proceeding to discipline Respondent who was admitted to practice as an attorney and counselor at law by the Court on March 29, 1961. The Special Referee originally designated was relieved on his request when he became a Justice of the Supreme Court. The subject matter of the proceeding is two

charges of professional misconduct, each of which will be considered separately.

Before that, a special note:

A TROUBLESOME ASPECT OF THIS PROCEEDING

In this proceeding, a straightforward question of fact has transformed a 1-year suspension ordered by this court into—to this date—an almost 7 year suspension. It has engaged the efforts of three major law firms and, as counsel, a former Justice of this Court, two special referees and the staff of the Grievance Committee; all in what might appear to be an improvident use of judicial attention and legal energy and talent—particularly since respondent's present counsel noted at one stage in the hearings before the predecessor Special Referee, "Mr. Garner is a suspended attorney. He is not living or residing here, he is not practicing law in this or any other jurisdiction. As I understand it, he has really no intention of returning to New York or of reapplying." (43)[1] This proceeding, it is recommended, should be brought to a prompt conclusion.

The Proceeding

(1)

By order dated October 1, 1984, this Court found respondent "guilty of serious professional misconduct" *Matter of Garner*, 103 AD 2d 390 (1984), and suspended him from the practice of law "for a period of one year, commencing November 1, 1984, and continuing until the further order of this Court, with leave to respondent to apply for reinstatement after said period of one year." (Pet'r Exh. 6).

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1 Reference to Minutes of Hearing.

(2)

The proceeding which resulted in the suspension order was instituted by the Grievance Committee by petition verified March 31, 1981 and served on respondent April 15, 1981 (Pet'r Exh. 1). That petition was amended by Amended Petition verified July 2, 1981 and served on respondent August 12, 1981 (Pet'r Exh. 3). The Amended Petition set forth ten charges, five of which were later withdrawn. Hon. Aaron Kooter, the Special Referee appointed by the Court to hear and report on the charges, filed his report with the Court dated January 25, 1984, sustaining only a portion of one charge and one entire charge—all relating to a single transaction in regard to an infant adoption which took place in California. (Pet'r Exh. 5).

(3)

While the Grievance Committee proceeding was going on, respondent, who had moved to California, was involved in the organization of the American Commerce National Bank, to be located in Anaheim Hills, California, and applied to the Office of the United States Comptroller of the Currency (hereinafter "O.C.C.") for approval as "organizer" and "director" of the proposed National Bank, in connection with which the matter he submitted a "Confidential Biographical and Financial Report", dated June 30, 1983. (Pet'r Exh. 7).

That report contained the following under Part A, section 4, (d) (*Id.* at page 6):

> "(d). Provide the following information regarding each disciplinary proceeding or action of which you are, or have been, the subject, with respect to any professional license you hold or have held. Examples: Disbarment, censure of conduct, revocation of license, etc.
>
> | *Name of Authority* | *Nature of Proceedings* | *Disposition and Date* |
> |---|---|---|
>
> NONE—except for nominal fee disputes inquires and a 1975 question of whether or not there was a violation of compact law, all of which have resulted in no action."

(4)

By letter to O.C.C. in connection with an application to add to his status in the Bank dated September 24, 1984, respondent submitted a purportedly "re-dated and resigned biography" (attached to Pet'r Exh. 9A) in which xeroxed signature page 14 of Pet'r Exh. 7 was amended in handwriting by respondent, "resigned and up to date 9/23/84;" and xeroxed page 1 of Pet'r Exh. 7 was amended delete the "X" from the word "Organizer" and insert an "X" in the space for "officer." Page 6, item d of Exh. 9A is not identical with page 6, item d of Pet'r Exh. 7 quoted above; the entire text of the response in item d in Exhs. 9, 9A and 14 is, "NONE," the qualifying language, "except for" etc. is omitted.

(5)

On November 12, 1985, a Senior Attorney in the Securities and Practice Division of O.C.C. telephoned the Office of the Grievance Committee and spoke to an Assistant Counsel. He apparently had come across the 1984 decision of this Court suspending respondent, reported in *Matter of Gerald J. Garner*, 480 N.Y.S.2d 127, and asked to see the record on the basis of which the suspension was ordered. (Resp. Exh. F).

Apparently, because of what the Assistant Counsel learned in that conversation, the Grievance Committee "opened a sua sponte complaint in December of 1985 against the respondent based on the filings with the Comptroller of the Currency," but was unable to prepare a formal petition in disciplinary proceedings until April, 1988, because respondent said he did not have copies of the "filings," that is, "documents submitted . . . by Mr. Garner in connection with his application for a [bank] charter . . . which contained false information," and the O.C.C. did not release such copies until May, 1987 (45-46, and Resp. Exh's. G, H and I).

The Petition and Answer

The Petition, verified April 4, 1988, was served on respondent May 26, 1988. An unverified answer dated August 19, 1988 was, on that date, *served on petitioner.*

The petition asserted that, in two separate instances, respondent was guilty of filing a false written statement. In each charge, petitioner alleged the earlier 1983 disciplinary proceedings, its origin, development, hearings, Referee's report, and decision of the Court suspending respondent.

In Charge I, the petitioner alleged that, in a "Confidential Biographical and Financial Report" dated June 30, 1983, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 3 of The Proceeding, supra at pp. 3-4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

In Charge II, the petitioner alleged that in a "Confidential Biographical and Financial Report" dated September 23, 1984, submitted to the U.S. Comptroller of the Currency, respondent falsely made the answer set forth in item 4 of The Proceeding, supra at p. 4, and that he knew or should have known that it was false, thereby violating Disciplinary Rule 1-102 A(4) and (6).

The unverified Answer denied the conclusionary allegations and denied knowledge or information sufficient to form a belief as to the allegations that the identified "Confidential" etc. "Reports" were submitted by him to the O.C.C., and admitted the 1981 disciplinary proceeding and his one-year suspension from the practice of law.

PRIMA FACIE PROOF OF THE CHARGES

The "Confidential Biographical and Financial Reports" admittedly submitted by respondent to the office of the United States Comptroller of the Currency and the uncontroverted record of the 1981 disciplinary proceeding, taken together, constitute *prima facie* proof of Charge I and, *a fortiori*, Charge II.

CHARGE II

We first address Charge II, which relates to a flat answer "NONE" to a request for information in regard to any "disciplinary proceeding" in which respondent was or had been "subject in respect to any professional license you hold" *Pet'r Exh. 9, Part A, Section 4, (d), at p. 6.*

Plainly, there was and had been a "disciplinary proceeding" of which respondent had been "the subject." Indeed, that proceeding had been on since 1981, it related to a series of significant charges of professional misconduct, there had been hearings over several days before a Special Referee who had then filed his Report to this Court and a copy of it was in respondent's hands. That Report found respondent guilty of some of the charges and the Report was under consideration by this Court at the time when that "Confidential" etc., "Report" was submitted to the United States Comptroller of the Currency by Respondent in September, 1984. "Biographical and Financial Reports" substantially identical to Pet'r Exh. 9 were then submitted to two Field Offices of the Comptroller of the Currency (Pet'r Exh. 9A and Pet'r Exh. 14).

The response "NONE" to Part A, Section 4 (d) in each of the "Confidential and Biographical and Financial Reports", Pet'r Exhibits 9, 9A, and 14, is false, and those Reports were submitted to a United States Government Agency in connection with the establishment and the operation of a National Bank.

CHARGE I

Charge I relates to Part A, section 4, (d) of the "Confidential Biographical and Financial Report" submitted to the Comptroller of the Currency in June, 1983 and is set forth in subdivision 3 of The Proceeding, *supra*. In response to request for information in regard to any "disciplinary proceeding" in which "you are or have been the subject in respect to any professional license you hold" (Pet'r Exh. 7 at page 6), respondent answered "NONE—except for nominal fee disputes inquiries and a 1975 question of whether or not there was a violation of a compact law, all of which have resulted in no action."

Although at the time respondent submitted the "Confidential Biographical and Financial Report," there was and had been pending against him for more than two years an attorney "disciplinary proceeding" in which respondent was and had been "subject in respect" to his "professional license" as an attorney, he answered "NONE–except," made no reference to the "Nature of Proceedings" in which he was involved, and, after making an unenlightening description "nominal fee disputes inquiries" and, similarly unenlightening, "question of whether or not there was a violation of a compact law," stated "all of which has resulted in no action," when in fact there had been a great deal of "action" in an ongoing "disciplinary proceeding" and a Special Referee had submitted a Report to this Court finding him guilty of professional misconduct.

The response by respondent to the request for information in Part A, Section 4, (d) of the "Confidential" etc. "Report" made to a United States regulatory agency in connection with the establishment of a National Bank, was so lacking in candor, so arch and unenlightening as to amount to misleading and grossly inaccurate.

Legal and Factual Defense

(a)

Respondent offers as a legal defense to the Charges that he was not required to disclose the 1981 disciplinary proceeding because under Judiciary Law section 90, subd. 10, it was sealed and deemed confidential. (Respondent's Post-Trial Memorandum Point I) But respondent claims that he disclosed the pending disciplinary proceeding by his grossly misleading answer in the 1983 "Confidential" etc. "Report" and flatly and falsely denied the existence of any disciplinary proceeding in the 1984 "Confidentially" etc. "Report." Judiciary Law section 90, subd. 10, does not grant an attorney a license to mislead, falsify and lie.

(b)

Respondent offers as a legal defense to the Charges that because an employee of the Office of the Comptroller of the Currency,

called as a witness, refused to go beyond the extent to which the Comptroller of the Currency authorized him to respond to the Subpoena Duce Tecum served on that office (121-123), the O.C.C. as a Federal agency being not subject to the State Court Subpoena, *Sharon* v. *F.E.R.C.*, 691 F.Supp. 381 (1988), and cases therein cited.

Significantly, respondent made no objections to the receipt in evidence of the certified copies of relevant "Confidential" etc. "Reports" which the witness produced (91, 94, 96) and which support the charges. Nevertheless, he asks that they be excluded.

(c)

Respondent offers as justification for the false and misleading statements contained in the "Confidential" etc. "Reports" submitted by him to the Office of the Comptroller of the Currency in connection with the organization and operation of a National Bank, that he did so on advice of his long-dead counsel. He testified that in 1983 he discussed the "Confidential" etc. "Reports" (Pet'r Exh) with his counsel who advised him that the "appropriate answer" to the request for information as to any "disciplinary proceeding . . . of which you are or have been subject with respect to any professional license you hold" was "NONE" but that he should send him the question "so he could inspect it" (223-24). And, "I sent him the whole confidential report . . . finally, several days after . . . he called back to my secretary and said that to tell me that the 'NONE' was the appropriate answer" (224).

We have long been taught to be most dubious of the accuracy of statements attributed to a person who is no longer alive, (2 Wigmore, Evidence section 578 and old CPA section 347 and 5 Weinstein Korn & Miller *New York Civil Practice*, p.p. 45-451 to 45-461), and the late Erwin Shapiro, a former Justice of this Court is the lawyer who supposedly gave respondent that peculiar advice. Significantly, Mr. Shapiro cautioned that he would have to see the document—the "Confidential" etc. "Reports"—before making up his mind, and respondent did not hear from Mr. Shapiro himself on the matter, but said he relied upon what his secretary said she had been told by Mr. Shapiro. Moreover, respondent him-

self had some reservations on the correctness of the "NONE" response: "I was not totally comfortable with adding 'NONE' and a dictation followed with my secretary where these additional words were put in" (224-25). And, "I would like to add a little more information. I am not comfortable with just putting in 'NONE' " (171).

The 1983 feeling of discomfort "with just putting in 'NONE' " seems to have moderated by 1984 when respondent filed the "re-dated and re-signed" "Confidential" etc. "Reports" in which the flat answer "NONE" appears in response to a request for information on any "disciplinary proceeding . . . of which you are or have been subject in respect to any professional license you hold." But in this regard, respondent testified that he really did not intend to delete the additional text after the word "NONE" (249). "Somebody took out everything after 'NONE' " (251). But there are three 1984 "Confidential Biographical . . . Reports," not identical with each other in several minor respects, but each giving the flat answer "NONE" to the "disciplinary proceeding" information request. (Pet'r Exhs. 9, 94, 14)

Matter in Mitigation

This Court, in *Matter of Garner*, 103 AD 2d 390, wrote of respondent's "impressive record of past and present community activities and ample evidence of good character." And, respondent has continued in that regard over the years since that decision.

There is also another aspect which may be considered by this Court in making its decision: the very significant fact that the Comptroller of the Currency has not found the circumstances which led to the present charges of sufficient gravity to offset respondent's character and quality to be the chief executive office of what has grown to be a significant and successful National Bank. And under his leadership.

Moreover, as noted at the outset, respondent's one year suspension from practice imposed by this court has grown—so far—to almost seven years. Whether respondent shares with petitioner responsibility for this unfortunate fact is of limited significance. The lengthy suspension has already imposed great hardship on

respondent and vastly extended the punishment imposed by this court without its knowledge or consent.

CONCLUSION

The Charges are sustained.

Respectfully submitted.

/s/ W. BERNARD RICHLAND
W. Bernard Richland,
Referee

July, 1991

State of New York
Grievance Committee for the
Ninth Judicial District
Crosswest Office Center
399 Knollwood Road - Suite 200
White Plains, N.Y. 10603

CONFIDENTIAL December 13, 1990

Donald Lamson, Esq.
Director
Securities & Corporate Practices
Division
Office of the Comptroller of the
Currency
490 L'Enfant Plaza S.W.
Washington, D.C. 20219

Re: Gerald J. Garner

Dear Mr. Lamson:

This Committee had previously been provided with certified copies of two filings made by Mr. Garner, one in 1983 and one in 1984, in which he sought approval to become director, and later, Chief Executive Officer of a National Bank in Anaheim, California. These certified copies were provided to the Committee, after our formal request for them, to be used in a Disciplinary Hearing regarding Mr. Garner's license to practice law in New York. The gravamen of the charges pending against Mr. Garner is that he submitted false answers to the O.C.C. in two Confidential Biographical and Financial Reports in which he maintained that he was not, and had not been, the subject of any disciplinary proceeding, when in fact he was.

These certified copies were irreparably damaged in a recent fire in the Committee's offices. Prior to the fire, I was directed by the Judge in this case to contact the O.C.C. regarding a discrepancy between the signature page on an uncertified copy of the 1984 filing and the certified copy of the same document. As a result of my inquiry, I have learned that the O.C.C. was in possession of more than one copy of the 1984 filing.

Please consider this letter the Committee's formal request to you to provide us with certified copies of both filings and of all correspondence , notes, memoranda etc., pertaining to Mr. Garner's applications to the O.C.C. with reference to the American Commerce National Bank of Anaheim, California. Additionally, we are formally requesting your office to provide us with a witness, preferably yourself, who could explain the circumstances surrounding the existence of two copies of Mr. Garner's 1984 filing and the differences between the two, as well as testimony on the procedures for seeking approval from the O.C.C to be a director or C.E.O. of a national bank, and the documentation involved in such an application.

Since a question has been raised as to the authenticity of the 1984 documents by Mr. Garner's attorney, the testimony of one who is familiar with the O.C.C's procedures is essential in establishing these documents as credible evidence in our case. The information to be provided in this testimony is unavailable from any other source, and written explanations would not be competent evidence under the rules against hearsay.

We anticipate the hearing to be rescheduled sometime after the beginning of January, 1991. I am grateful for your consideration of this request and hope that you will be able to comply.

Very truly yours,

S/

Sondra S. Holt
Associate Counsel

SSH/lr
0556e

MORRISON & FOERSTER
Attorneys at Law
1290 Avenue of the Americas
New York, New York 10104
(212) 468-8000

April 10, 1991

CONFIDENTIAL

BY TELEFAX AND MAIL

James Gillespie, Esq.
Assistant Director of Litigation
Office of the Comptroller of the Currency
490 L'Enfant Plaza
Washington, D.C. 20219

Re: In re Gerald J. Garner,
(N.Y. App. Div., 2d Dep't)

Dear Jeff:

On November 7, 1990, we served a subpoena duces tecum issued by the New York State Appellate Division for the Second Department upon the Office of the Comptroller of Currency ("OCC") on behalf of our client, Gerald J. Garner, the respondent in an attorney grievance proceeding now underway before that Court. A hearing in this matter is now outstanding and we expect compliance at or before the hearing.

Sincerely yours,
S/
David Z. Seide

DZS: cd
cc: Mr. Donald Lamson

No. 92-957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GERALD J. GARNER,

Petitioner,

—v.—

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 92-957

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

GERALD J. GARNER,

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- v. -

GRIEVANCE COMMITTEE FOR THE NINTH JUDICIAL DISTRICT,

Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

1. Respondent suggests (Br. in Opp. 4-5) that the repeated refusal of the single prosecution witness to answer cross-examination questions is of no consequence because the case against petitioner was provable without calling the witness. The argument, even if it correctly reflected the record, would be no basis for avoiding the due process question stated

in both the petition and the brief in opposition (p. 1). It is surely not the law that cross-examination may be denied on the contention that the party seeking it would lose in any event. Moreover, the contention is wrong on its face, as the Referee himself recognized.

As shown in the petition, the cross-examination questions the witness refused to answer went, as the Referee said (Tr. 126-27), to "the principal question" in the proceedings. There is no suggestion that the long series of questions the witness was allowed to reject (Pet. 9-10) were outside the scope of the direct testimony. The Referee's observation reflected an awareness that the alleged grievance against petitioner, understood in the context petitioner's counsel sought to develop, could have been proved baseless or at a minimum too trivial to warrant a serious sanction had the blocked lines of inquiry been pursued.

There is no weight in the further suggestion (Br. in Opp. 5) that petitioner's counsel could have had his cross-examination questions answered if he had made "a formal request to the OCC, as Respondent did, for whatever testimony he deemed relevant to his case." It is at best an anomaly to require that a party should "request" in advance the testimony to be adduced on cross-examination of a hostile witness. If anything could be said for the idea, it cannot serve to obviate the undisputed fact that the petitioner's cross-examination was blocked by the witness's permitted refusals to answer.

2. Repeating the position successfully pressed in the New York courts, respondent says (Br. in Opp. 6):

> Under the doctrine of sovereign immunity and as a general rule of Federal Law, Federal Agencies and their employees are not subject to state court subpoena power.

That unqualified proposition, considered with the three cases cited to support it, underscores the aptness of this case for the granting of certiorari.[1]

Respondent invokes *Touhy* v. *Ragen*, 340 U.S. 462 (1951), which petitioner has urged as an authority that is distended by the decision in this case; properly understood, in light of succeeding precedents, *Touhy* helps to demonstrate the conflict with the governing principles this Court has declared. In *Touhy* a subordinate official of the United States Department of Justice, obeying a regulation of the Attorney General, refused to produce departmental papers. When it sustained that position, this Court noted the provision in the regulation that the material could "be submitted to the court for determination as to its materiality to the case and whether in the best public interests the information should be disclosed." 340 U.S. at 466. Because "no such limited disclosure was requested" and the demand for production was "without limitation", this Court held that the witness "was not guilty of contempt unless the law required the witness to make unlimited production." *Id.* In that setting, because the law imposed no such unbounded requirement, there was no occasion to consider "[t]he constitutionality of the Attorney General's exercise of a determinative power as to whether or on what conditions or subject to what disadvantages to the

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[1] Two of the three citations are to district court decisions quashing discovery subpoenas to federal agencies in pending "state" (District of Columbia) actions and relying upon sovereign immunity, *inter alia*, as grounds of decision. *Sharon Lease Oil Co.* v. *F.E.R.C.*, 691 F. Supp. 381 (D.D.C. 1988); *Environmental Enterprises, Inc.* v. *U.S. E.P.A.*, 664 F. Supp. 585 (D.D.C. 1987). Among the several reasons the cases are not useful bases for opposing certiorari is the distinction between those discovery subpoenas and the subpoena herein to aid in cross-examining the federal employee appearing voluntarily as a witness.

Government he may refuse to produce government papers under his charge . . . ." *Id.* at 469.[2]

The question thus left open, and shown by this Court's decisions in the intervening forty years to require an answer rejecting any such "determinative power," is presented in this case. The Referee, sustained by the New York appellate courts, accepted as decisive and controlling the agency employee's defiance of the subpoena. Even the use of the word "compliance" in a question was declared, in a governing jest, to be "a naughty term" (Tr. 112). When asked to look at a withheld document to aid in the inquiry as to its availability, the Referee would not do even that, declining "to inspect anything that has not been offered and admitted in evidence" (Tr. 82-83).

The "determinative power" unexamined in *Touhy* has been denied repeatedly in rulings by this Court on various claims of executive and cognate privilege since 1951. Those decisions, reviewed in the petition (pp. 17-18), show that the ultimate decision is for the court, not the executive officer, upon a suitable appraisal of the withheld materials to balance the need for the evidence against the interest in confidentiality. The abdication of this judicial responsibility in this case is particularly objectionable when the controlling power was asserted not by a department or agency head but by another subordinate agency employee, the "counterpart" of the witness, who "instructed [him] that [he] was to ignore the subpoena" (Tr. 106), referring to some "agreement" that was never shown to exist and was flatly denied, without further question, by responsible counsel (Tr. 86, 107).

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[2] In a concurring opinion, Justice Frankfurter observed that the decision in *Boske* v. *Comingore*, 177 U.S. 459 (1900), held controlling by the Court in *Touhy*, contained "not a hint . . . that the Government can shut off an appropriate judicial demand for . . . papers."

Finally, this reply must lay to rest a misstatement of the facts. Having opened the subject of the subpoena with its sweeping assertion of "sovereign immunity and . . . Federal law" making state court subpoenas unenforceable against federal employees (Br. in Opp. 6), respondent ends by asserting a "position that the OCC did comply with Petitioner's subpoena" (*id.* at 7). That position is unfounded. As shown by unquestioned and unquestionable references to the record, the employee neither purported to nor did comply with the subpoena, specifying documents he had not produced, including the one the employee brought but the Referee refused to look at (Tr. 82-83, 106-108, 113, 115, 139).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider a summary remand for consideration of the stated questions raised but not explicitly treated by the New York appellate courts.

Respectfully submitted,

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